(3)

No. 95-1642

Supreme Court, U.S.
FILED
MAY 30 1996
CLERK

In The

Supreme Court of the United States

October Term, 1995

FERNANDO GOMEZ, M.D.,

Petitioner,

v.

ALLEGHENY HEALTH SERVICES, INC., a/k/a ALLEGHENY HEALTH EDUCATION AND RESEARCH FOUNDATION; MEDICAL COLLEGE OF PENNSYLVANIA; DEPARTMENT OF VETERANS AFFAIRS MEDICAL CENTER; BERNARD SIGEL, M.D.; HOWARD ZAREN, M.D.; PASCHAL M. SPAGNA, M.D.; STEVEN G. MEISTER, M.D.; GLEN WHITMAN, M.D.; LESLIE A. MILLER, ESQUIRE,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

REPLY TO BRIEF IN OPPOSITION TO WRIT OF CERTIORARI

RICHARD J. SILVERBERG
Counsel of Record for Petitioner
REBECCA J. HOULDING
RICHARD J. SILVERBERG AND ASSOCIATES, P.C.
3700 Bell Atlantic Tower
1717 Arch Street
Philadelphia, PA 19103-2793
(215) 994-5300

JANE R. GOLDBERG, ESQUIRE
Two Bala Plaza, Suite 300
Bala Cynwyd, PA 19004
(610) 664-5556
Of Counsel

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

2 cpies

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

I. INTRODUCTION 1

II. RESPONDENTS KNOWINGLY MISREPRESENTED THE RECORD 1

A. Respondents' Contention That There Was No Evidence That Dr. Meister Was The Main Referrer Of Cardiac Patients For Surgery Is A Blatant Misrepresentation Of The Record 1

B. Respondents' Contention That There Was No Evidence That Dr. Meister Was Responsible For Making Patient Referrals To Petitioner Is A Blatant Misrepresentation Of The Record 3

C. Respondents' Contention That Dr. Meister Made Patient Referrals To Petitioner Is A Blatant Misrepresentation Of The Record .. 4

D. Respondents' Contention That the Cardiologists Were "Losing Patients Who Should Have Lived" Is A Blatant Misrepresentation Of The Record 5

E. Respondents' Contention That Petitioner's Letters Of Recommendation Were Not Admitted For Their Content And Could Not Be Considered By The Jury Is A Blatant Misrepresentation Of The Record ... 6

III. Respondents Misinterpret The Third Circuit's Local Rules Pertaining To The Use Of Two Judge Panels To Decide Appeals 7

IV. CONCLUSION 8

APPENDIX ..... App. 1

TABLE OF AUTHORITIES

Page

28 U.S.C. §46(b) 8

Internal Operating Procedures of the United States Court of Appeals for the Third Circuit, Section 3.1 7

REPLY TO BRIEF IN OPPOSITION TO WRIT OF CERTIORARI

I. INTRODUCTION

On April 10, 1996, petitioner, Dr. Fernando Gomez, filed a writ of certiorari seeking review of a decision of the United States Court of Appeals for the Third Circuit. The petition arises from the reversal of a unanimous jury verdict in favor of Dr. Gomez on his claim that he was discharged by the Medical College of Pennsylvania ("MCP") on the basis of his national origin.

On May 13, 1996, respondents filed a brief in opposition to the petition. With utter disregard for their duty of candor, and with the intent to deceive the Court, respondents have contended that petitioner contrived many of the facts set forth in the petition in an effort to bolster his chances for review. This is an outrageous, unethical attempt to dissuade the Court from granting the petition.

The primary purpose of this reply is to correct respondents' knowing misrepresentations of the record, and to request that counsel for respondents be sanctioned, pursuant to Rule 8, for "conduct unbecoming a member of the Bar of this Court."

II. RESPONDENTS KNOWINGLY MISREPRESENTED THE RECORD

A. Respondents' Contention That There Was No Evidence That Dr. Meister Was The Main Referrer Of Cardiac Patients For Surgery Is A Blatant Misrepresentation Of The Record.

In its verdict, the jury implicitly found that Dr. Steven Meister, Chief of MCP's Division of Cardiology,

was the "main referrer" of cardiac patients for surgery, that the success of petitioner's employment hinged upon Meister's decisions to refer, or to not refer, patients to him for surgery, that Dr. Meister harbored an acute national origin bias against petitioner, that he refused to refer any cases to Dr. Gomez from the very outset of petitioner's employment, and that MCP discharged Dr. Gomez because he "generated few, if any, new patient referrals to the Division of Cardiothoracic Surgery." Reply App. at 1-2.

In their opposition brief, respondents state:

> In his statement of the case, petitioner, *without any support in the record*, states that Dr. Meister was the "main referrer" of cardiac patients for surgery. *There was no testimony to this effect* nor evidence that the majority of referrals were controlled by Dr. Meister.

Opp. Brf. at 3 (internal citation omitted) (emphasis supplied). However, Dr. Howard Zaren, Chairman of MCP's Department of Surgery, testified that Meister was indeed the "main referrer."

> Q: And understanding that Dr. Gomez was not receiving referrals, which is your testimony, did you also understand that he was not receiving referrals specifically from Dr. Meister?
>
> A: Well, Dr. Meister was the chief of cardiology, the full-time chief of cardiology, and he would be the *main referrer. And if he wasn't getting them, that's who he wasn't getting them from.*

Reply App. at 4 (N.T. of May 24, 1994 at 37, testimony of Dr. Howard Zaren) (emphasis supplied). This testimony, which went to the very heart of petitioner's case and was unchallenged below, was accepted by the jury as true.

Although respondents state that the cardiologists made patient referrals to the "Spagna/Gomez team," Opp. Brf. at 4, the jury believed Dr. Zaren's testimony that referrals were made on an individual basis, Reply App. at 5-7 (N.T. of May 24, 1994 at 28-29, testimony of Dr. Howard Zaren), and that the staff cardiologists were not responsible for making referrals.

Contrary to respondents' claims, Dr. Zaren's testimony was clearly referenced in petitioner's submissions to the District Court, as well as to the Third Circuit. Respondents' intentional misrepresentation to the Court that this critical evidence did not exist is a gross violation of respondents' duty of candor to the Court and should be sanctioned.

B. Respondents' Contention That There Was No Evidence That Dr. Meister Was Responsible For Making Patient Referrals To Petitioner Is A Blatant Misrepresentation Of The Record.

Next, respondents state:

> In addition, petitioner's suggested findings are not supported by the record. There was *no evidence* that Dr. Meister was 'responsible for making patient referrals to petitioner' . . .

Opp. Brf. at 11 (internal citation omitted) (emphasis supplied). However, as set forth in Part A *supra*, Dr. Meister

was the primary referrer, and "if [petitioner] wasn't getting [referrals], that's who he wasn't getting them from." Reply App. at 4. Thus, respondents' representation to the Court is directly contrary to what is perhaps the most important testimony adduced at trial.

C. Respondents' Contention That Dr. Meister Made Patient Referrals To Petitioner Is A Blatant Misrepresentation Of The Record.

In their opposition brief, respondents state:

> In addition to mischaracterizing Dr. Zaren's testimony, petitioner incorrectly states that Dr. Meister never referred patients to petitioner. *The uncontradicted evidence, however, is to the contrary.*

Opp. Brf. at 3 (internal citation omitted) (emphasis supplied). However, Dr. Meister's own testimony belies respondents' assertion. On direct examination, Dr. Meister testified:

> Q: Sir, the question is, did you ever refer a case to Dr. Gomez individually?
>
> A: I don't think I ever did.

Reply App. at 7 (N.T. of May 18, 1994 at 46, testimony of Dr. Steven Meister). Additionally, Dr. Gomez himself testified that he received no referrals. Reply App. at 8-9 (N.T. of May 17, 1994 at 12, 16, testimony of Dr. Fernando Gomez). While petitioner's claim hinged upon Dr. Meister's refusal to refer patients to him due to Meister's national origin bias, a bias which MCP did nothing to

correct, respondents' counsel intentionally misrepresented to the Court that this critical testimony did not exist.

D. Respondents' Contention That the Cardiologists Were "Losing Patients Who Should Have Lived" Is A Blatant Misrepresentation Of The Record.

In their opposition brief, respondents state:

> The cardiologists complained that they were *losing patients who should have lived* . . .

Opp. Brf. at 4-5 (footnote omitted). This is a defamatory misrepresentation of the record. Although MCP paraded a host of cardiologists to the witness stand, there was no testimony, or documents introduced into evidence, showing that the cardiologists complained that they were *losing patients who should have lived*, and respondents' citation to the record provides absolutely no support for this outrageous claim. To the contrary, Dr. Gomez testified that the mortality rate for coronary bypasses was approximately 4.5, which he characterized as very good in light of the number of difficult cases. Reply App. at 10-11 (N.T. of May 25, 1994 at 23-24, testimony of Dr. Fernando Gomez). Respondents' unsupported claim that Dr. Gomez was responsible for "losing patients *who should have lived*" is an outrageous attempt to portray petitioner in a negative light.

E. Respondents' Contention That Petitioner's Letters Of Recommendation Were Not Admitted For Their Content And Could Not Be Considered By The Jury Is A Blatant Misrepresentation Of The Record.

Next, respondents intentionally misrepresented to the Court that the content of petitioner's favorable letters of recommendation "were not admitted for their content" and "could not be considered by the jury." Opp. Brf. at 3, n. 2 (arguing that letters admitted "*solely* for the purpose of showing that Dr. Gomez had been recommended for the position.") (emphasis supplied); *see also* p. 10, n. 8. To the contrary, these letters were admitted into evidence and submitted to the jury for their consideration to show what MCP relied upon in its decision to recruit petitioner to work there.

THE COURT: Well sir, these are letters of recommendation that counsel wishes to show you concerning Dr. Gomez, prior to his hire, which were sent to you by various persons. Did you consider these letters in making a decision to extend an offer or contract with [sic] Dr. Gomez?

DR. SIGEL: Yes, they were part of the consideration.

THE COURT: I'll permit [counsel for plaintiff] to offer these as to what was received and considered. As to whether it's true or not, they are not – they can't be offered for that purpose. But they

> are received as to what was considered to be letters of recommendation for Dr. Gomez.

Reply App. at 12 (N.T. of May 18, 1994 at 154, testimony of Dr. Bernard Sigel, former Chairman of Surgery).

These letters were extremely probative because they demonstrated that MCP officials had reason to know that claims of Dr. Gomez's poor performance were baseless, bolstering his proof of pretext. MCP's misrepresentation to this Court that this evidence was not even considered by the jury is a gross violation of respondents' duty of candor to the Court and should be sanctioned.

III. Respondents Misinterpret The Third Circuit's Local Rules Pertaining To The Use Of Two Judge Panels To Decide Appeals.

Respondents completely misinterpret the Internal Operating Procedures ("I.O.P.") of the Third Circuit. Although accurately quoting I.O.P. 3.1 ("[u]nless there is a judicial emergency, each panel includes at least two judges of *this* court") (emphasis supplied), respondents misunderstand this section to mean that appeals may be decided by two-judge panels. However, the I.O.P. must be read in the context of Title 28 of the United States Code:

> In each circuit the court may authorize the hearing and determination of cases and controversies by separate panels, *each consisting of three judges, at least a majority of whom shall be judges of that [circuit] court*, unless such judges cannot sit because . . . there is an emergency . . .

28 U.S.C. § 46(b) (emphasis supplied). Therefore, the I.O.P. cited by respondents permits a panel to consist of less than a majority of judges *from within that circuit*. It does not relax the requirement that three judges must hear and decide an appeal.

IV. CONCLUSION

Each party bears a duty of candor toward the tribunal. In the context of a petition for a writ of certiorari, this duty is particularly important since the Court does not yet possess the relevant portions of the record. Here, as set forth above, respondents have intentionally misrepresented that petitioner contrived evidence in an unethical and illegitimate attempt to persuade the Court to ignore the jury's verdict and to deny the petition. Such a blatant violation of the duty of candor to the Court must not be tolerated and calls for the imposition of sanctions. At a minimum, respondents' misconduct substantially undermines the credibility of their challenge to the petition, which should be granted based upon the merits, and not denied in reliance upon these intentional misrepresentations.

For all of these reasons, as well as the reasons set forth in the petition, a writ of certiorari should be granted to review the Third Circuit's decision.

Respectfully submitted,

RICHARD J. SILVERBERG
Counsel of Record for Petitioner
REBECCA J. HOULDING
RICHARD J. SILVERBERG AND
ASSOCIATES, P.C.
3700 Bell Atlantic Tower
1717 Arch Street
Philadelphia, PA 19103-2793
(215) 994-5300

JANE R. GOLDBERG, ESQUIRE
Two Bala Plaza, Suite 300
Bala Cynwyd, PA 19004
(610) 664-5556
Of Counsel

[LOGO] MCP The Medical College of Pennsylvania

Howard A. Zaren, M.D., F.A.C.S.
Professor and Interim Chairman
Department of Surgery
(215) 842-6582

July 17, 1990

Fernando R. Gomez, M.D.
The Medical College of Pennsylvania
3300 Henry Avenue
Philadelphia, PA 19129

Dear Dr. Gomez:

I am writing in response to your recent undated letter stating your concerns occasioned by a letter dated June 27, 1990 from Leslie Ann Miller, Esquire, Secretary of the Board of Directors of The Medical College of Pennsylvania ("MCP"), reappointing you to the faculty for a final six-month term and advising that your appointment as an employed faculty member within the Department of Surgery (the "Department") will not be renewed beyond that term. Your letter was received in the Department on July 9, 1990.

Your letter contains a request, made pursuant to Article III, Section 9(c) of the Faculty Bylaws of MCP (the "Bylaws"), that you be furnished with written notice of the reasons why your faculty appointment will not be renewed. In my capacity as Interim Chairman of the Department, I will respond to that request. As you may recall from our recent conversation which took place in the presence of Dr. Paschal D. Spagna, I advised you that

the main reason involves the economic realities of operating the Department. Specifically, because you have generated few, if any, new patient referrals to the Division of Cardiothoracic Surgery, it is not economically feasible for the Department to continue to exhaust its limited resources to employ you

In your letter you also raise questions as to (1) whether Ms. Miller's June 27, 1990 letter constitutes adequate notice to you, within the meaning of Article III, Section 9(c) of the Bylaws, that your faculty appointment will not be renewed and (2) whether the six-month terminal reappointment period provided for in Ms. Miller's letter violates the provision of Article III, Section 9(a) of the Bylaws which states that nontenured faculty members are retained on a yearly contract.

I do not know the answers to those questions. However, in the interest of an amicable resolution of the issues presented in your recent undated letters to Ms. Miller and me relating to your terminal reappointment, I would be willing to consider recommending to the Dean of MCP that appropriate action be taken to extend your terminal reappointment period through June 30, 1991, the end of the current academic year. Your appointment as a member of the employed faculty within the Department would not be continued beyond that date.

Please advise me as to whether the foregoing discussion adequately addresses the concerns raised in your recent undated letters to Ms. Miller and me.

Very truly yours,

/s/ Howard A. Zaren
Howard A. Zaren, M.D., F.A.C.S.
Interim Chairman

HAZ:mej

---

* * *

[p. 37] operated on, whether it be the full-time group or the volunteer group, correct?

A In essence I cared that we were a busy division of cardiothoracic surgery at the Medical College of Pennsylvania. I did care a bit more that it would be the full-time people that were the busiest because those dollars stayed in the department and stayed at the Medical College of Pennsylvania.

If the private physicians operated on patients, those finances went to the private physicians and did not come to the division of cardiothoracic surgery. But overall as you asked, Mr. Silverberg, I cared that the division be a busy division.

Q Whether it was Dr. Gomez operating a case or someone else, correct?

A Yes, correct.

Q And understanding that Dr. Gomez was not receiving referrals, which is your testimony, did you also understand that he was not receiving referrals specifically from Dr. Meister?

A Well, Dr. Meister was the chief of cardiology, the full-time chief of cardiology, and he would be the main referrer. And if he wasn't getting them, that's who he wasn't getting them from.

Q But you never confronted Dr. Meister and asked him why

* * *

[p. 28] there were several private groups of surgeons that practiced there that were not full-time.

Q But the question is, there were no such things as teams of surgeons to operate cardiac patients at MCP while you were there, correct?

A I'm not familiar with the team, what your team concept you are trying to say.

There were several groups of practicing surgeons at the Medical College of Pennsylvania during my period of being interim chairman.

THE COURT: How did the group operate?

THE WITNESS: How the other groups operate? The –

THE COURT: Well, how did the group of Spagna and Gomez procedurally operate?

THE WITNESS: They were –

THE COURT: I don't mean operate on patients –

THE WITNESS: Right.

THE COURT: – I mean how they take care of the business –

THE WITNESS: Yes.

THE COURT: – internally?

THE WITNESS: Yes, your Honor. They were full-time employees of the Medical College of Pennsylvania as opposed to the other private groups who were in

private practice, who practiced cardiothoracic surgery at the Medical College of [p. 29] Pennsylvania.

THE COURT: Counsel's question really is whether or not Dr. Gomez was independent from Dr. Spagna?

THE WITNESS: No, absolutely not. They were members of the same group.

BY MR. SILVERBERG:

Q Let me ask the question this way.

When a referral is made from the division of cardiology to the division of cardiothoracic surgery, the cardiologists selects the specific surgeon to do the work on the patient, correct?

A That is correct.

Q And the cardiologist refers the patient to the surgeon of the cardiologists choice, correct?

A That is correct.

Q Now, you had no difficulty understanding Dr. Gomez when he spoke to you, is that fair?

A Usually not.

Q Well, it's true that the only occasion that you had – strike the question.

That the only difficulty that you had in understanding Dr. Gomez was attributable to a small hearing defect of your own, correct?

A Yes. I have a small hearing defect, and when Dr. Gomez would become a little excited, it was some times difficult

* * *

Meister – Direct

[p. 46] spoken to him and he's agreeable.

That's the way you do it when you have a team. If I had someone who specifically requested Dr. DiCessa which happens sometimes, or Dr. Whitman which happens sometime, then I'll make that known. But it was customary with the Spagna-Gomez team that you referred to those people.

Q Sir, the question is, did you ever refer a case to Dr. Gomez individually?

A I don't think I ever did.

Q Thank you.

(Pause in proceedings.)

Q To take a quick step back.

At any time did you ever speak to any of the people at the Deborah that Dr. Gomez had worked with in your interviewing of him?

A No, I don't think so. That wouldn't have been appropriate.

Q When you referred cases – strike the question.

Dr. Whitman began his employment at MCP in August 1990, correct?

A That's right.

Q And you referred cases individually to Dr. Whitman because he was on trial, correct?

* * *

Gomez – Direct

[p. 12] I was thinking that I was doing a good job and I was very earnest about it, because I was giving my whole body and my whole spirit and my whole brain to try to put this work to be successful. I didn't know anything more.

Q Were you working with the full time cardiologists at MCP or the volunteer cardiologists – I'm sorry, strike the question.

Were you working with the full time cardiologists at MCP at that point?

A Yes, my contract say that I cannot work with any other body outside of the hospital, so for that reason I was working only with the people at Medical College of Pennsylvania.

Q At that six – at this six month juncture, what if referrals had Dr. Meister made to you for cardiac surgery?

A Zero.

Q Who is Dr. Nelson Wolfe?

THE COURT: Well, just a minute. How many, if you know, had he made to Dr. Spagna?

THE WITNESS: The rest of the cases, sir.

THE COURT: How many were they?

THE WITNESS: I don't have the statistics at the present moment with me, so for that reason I cannot be mathematical sure about this answer. But I am telling you that when I –

* * *

[p. 16] THE COURT: At what – at that time, what conversation did you have with him?

THE WITNESS: I told him that I noticed that there was a decrease of cases for the surgical – for the cardiothoracic member of the hospital and I told him that I did not have any referral from the cardiothoracic – from the cardiac department for myself.

THE COURT: Now are you saying, sir, that the number of referrals was going down?

THE WITNESS: Yes, sir.

THE COURT: And you still were not getting any referrals of the referrals that were being made?

THE WITNESS: Yes, sir.

THE COURT: Okay. Was any explanation at that time given to you by Dr. Spagna?

THE WITNESS: He told me that was an internal affair, that that was the way to work at the cardiology department at the Medical College of Pennsylvania and he cannot do anything.

And the reason why I talking with there, sir –

THE COURT: No, just a minute.

MR. SILVERBERG: Your Honor, as a preliminary matter, we would move Exhibit P-5 into admission.

THE COURT: It's admitted.

(Plaintiff's Exhibit 5 is admitted into evidence.)

* * *

[p. 23] BY MR. SILVERBERG:

Q There has been testimony about the mortality rate for the full-time surgeons at MCP, did you maintain statistics concerning the mortality rate for the full-time surgeons at MCP while you were there?

A Yes, sir, I did, that was my job all the time in the hospital before I started to work, because there was no statistic in that hospital, nobody knows what happened there. So, for that reason my job was to do the statistics and also was to do the . . . an insurance review, to make sure about the quality of the care of the patients. So, I knew all the complications and I report all the complications of each of the patients each month to the administration of the hospital and to Dr. Spagna, who was my chief.

Q Do you recall the morbidity and mortality statistics for the years that you worked at MCP?

A I am not completely sure about, but I recall that the mortality for coronary bypasses was around 4.5, 4.6.

Q And based on your experience as a cardiothoracic surgeon how would you characterize that mortality rate as – for example, as being high or low?

A I believe that was a good – good mortality, because there was around 166 or 170 cases and the mortality was seven cases. And we take a lot of complications for the cardiothoracic division of the Medical College of [p. 24] Pennsylvania, as I recall there was around 12 cases that we had to operate as emergency. These are very difficult cases, so for that reason the mortality that we have or Dr. Spagna has in the coronary artery bypass was not very high, was acceptable.

Q There has been testimony here about the application of carotid artery massage, what is – briefly, what is carotid artery massage?

A Carotid artery massage is a maneuver to try to produce a stimulation of the nerves who are around the carotid bifurcation. The reason for that maneuver is to decrease the heart rate.

Q Now, describe for the jury how one actually engages in carotid artery massage, how one does it?

A According with a book that is called the Manual of Cardiac Care from Massachusetts General Hospital the person who is going to do a carotid massage has to compress the bifurcation of the aorta against the vertebral bones. The compression had to be back and forth, up and down, and had to be a compression with a force strong enough to produce an indentation in a tennis ball, that's what the book say. That maneuver had to last only few seconds.

Q Was there an incident at the Medical College of Pennsylvania in which you had instructed that a patient not receive carotid artery massage?

* * *

[p. 154] MR. HUNSICKER: Object to the letters of reference to the extent they're being used for matters of the truth asserted in these letters on hearsay grounds.

THE COURT: Just a second, please.

(Pause in proceedings.)

THE COURT: Well sir, these are letters of recommendation that counsel wishes to show you concerning Dr. Gomez, prior to his hire, which were sent to you by various persons. Did you consider these letters in making a decision to extend an offer or contract with Dr. Gomez?

THE WITNESS: Yes, they were part of the consideration.

THE COURT: I'll permit you to offer these as what was received and considered. As to whether it's true or not, they are not – they can't be offered for that purpose. But they are received as to what was considered to be letters of recommendation for Dr. Gomez.

MR. SILVERBERG: Approach?

THE COURT: Yes. It's not –

MR. SILVERBERG: You can mark them collectively and just sit them up there.

THE COURT: Well they were letters of recommendation received from various people. They're admitted as the fact the letters were received from certain persons. You may ask the witness whether or not he assumed everything in there to

* * *